

OGC Has Reviewed

Director

General Counsel

Audit Exceptions Concerning Per Diem Payments

Legal Review Process
J. Rizzo
19 November 1948

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1. We have considered carefully the attached file concerning per diem payments made to Miss [redacted] and Miss [redacted], with particular reference to what action, if any, the Director is legally authorized to take. In spite of the lengthy memoranda which analyzed the technicalities of these cases, the situation seems simple.

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2. Per diems were authorized for each employee while in Washington on temporary duty, and vouchers were certified for payment by the certifying officers. At the time the payments were authorized and made, papers were on file in the office indicating that their addresses were in Washington. (It is apparently true that in conversations the employees were asked where their homes were and mentioned other than Washington addresses, but the fact remains that Personal History Statements and other documents set forth addresses in Washington.) It is apparent therefore that, although appointed for overseas stations with temporary duty in Washington, neither Miss [redacted] nor Miss [redacted] entered into actual travel status until they left Washington.

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3. Under the Standardized Government Travel Regulations, per diem may not be allowed until an employee enters into a bona fide travel status. Your instructions and the Special Funds Regulations in force at the time required compliance with the Standardized Government Travel Regulations. We feel it must be concluded that there was no basis for certification of the per diem vouchers for Miss [redacted] and Miss [redacted], as no circumstances existed which would raise an obligation on the part of the Government. This is based on the responsibility placed by law on the certifying officer, as set forth clearly in a recent decision of the Comptroller General (28 Comp. Gen. 17, B-74820).

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4. In that case, the Commissioner of Internal Revenue had certified a voucher in which an erroneous computation had been made by subordinates. The exception was not taken by the auditor until two and one-half years later, by which time the statute of limitations prevented any recovery from the taxpayer. The Secretary

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of the Treasury pointed out that there was no fault or negligence of the certifying officer and that the Comptroller General may in his discretion relieve a certifying officer of liability whenever:

a. He finds that the certification was based on official records and that such certifying officer or employee did not know and by reasonable diligence and inquiry could not ascertain the actual facts; or

b. That the obligation was incurred in good faith that the payment was not contrary to any statutory provision and that the United States has received value for the payment.

In his answer, the Comptroller General pointed out that under the law an officer certifying a voucher shall:

a. Be held responsible for the existence and correctness of the facts recited in the certificate or otherwise stated in the voucher or its supporting papers, and for the legality of the proposed payment under the appropriation or fund involved; and

b. Be held accountable for and required to make good to the United States the amount of any illegal, improper, or incorrect payment resulting from any false, inaccurate, or misleading certificates made by him, as well as for any payment prohibited by law or which did not represent a legal obligation under the appropriation or fund involved.

He quoted an earlier opinion to the effect that a certifying officer may not escape liability for losses resulting from his improper certification merely by stating that he was not in a position to ascertain of his personal knowledge that each item on the voucher was correctly stated.

5. If the error could have been discovered by exercise of reasonable diligence and inquiry, the relief may not be granted under the Comptroller General's statutory authority under the first proviso of the authority quoted above, and if the United States does not receive value for amount of the overpayment, he cannot grant relief under the second proviso. The fact that recovery from the individual may be impossible does not affect the liability of the certifying officer, who becomes the first source of recovery of the payment to the United States, which is entitled to look to him and hold him responsible under his bond for any losses resulting from his erroneous certification of facts.

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6. This ruling of the Comptroller General is based on the fact that because of the error in computation there was no obligation on the part of the Government. We believe it is directly applicable to the present situation, for through a misapprehension of the facts, payments were made when, under the existing circumstances, there was actually no obligation on the part of the Government as there was no travel status.

7. We have given particular attention to the special authority vested in you as Director of Central Intelligence over unvouchered funds available to the Agency. There is no question of your power to use these unvouchered funds as you see fit. No one in Government is authorized to go behind your certification. But it is our opinion that inherent in this grant of public funds to your sole discretion are certain restrictions as to the legal exercise of this power. Unvouchered funds are granted on the acknowledgment by Congress and the Comptroller General that such funds are required for security of operations, support of abnormal operations, to meet emergencies, and to take care of extraordinary expenses necessary to the proper exercise of CIA functions. Wherever these elements, or any of them, are present, there will be no question of the legality of payments you deem necessary, even in cases where ordinarily there would be no obligation on the part of the Government.

8. Applied to the two instant cases, we reach the following results. There appears to be no security consideration which would require the payment of per diem in either case. Failure to pay per diem would not hamper or prevent the performance of essential operations. There were no emergency or extraordinary features connected with either case. It is true that there is no law which requires you to follow the Standardized Government Travel Regulations in all cases. However, we find a clear guide to this situation, too, in a Comptroller General's decision set forth in 23 Comp. Gen. 884.

9. The Office of Economic Warfare was given an appropriation which specified that travel expenses might be paid for travel outside the United States without regard to the Standardized Government Travel Regulations and the Subsistence Expense Act of 1926. An employee traveled from Washington to Lisbon where he became ill and was ordered to return. An exception was taken to payment of the voucher on the grounds that the travel performed was for personal reasons and therefore not an obligation of the Government. The

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Office of Economic Warfare pointed to their appropriation language, claiming that they were exempted from the normal travel limitations. The Comptroller General referred to previous decisions concerning travel for personal reasons and then stated as follows:

"While these decisions were rendered more particularly with reference to employees whose official travel was subject to the Subsistence Expense Act of 1926, 44 Stat. 888, as amended, and the Standardized Government Travel Regulations, nevertheless the rule appears equally applicable to official travel not controlled by said statute and regulations, as in the instant case. That is to say, the appropriation for traveling expenses here chargeable may not be regarded as available for travel not performed on official business but for personal reasons."

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10. In view of the foregoing, it is our opinion that the payments to Miss [redacted] and Miss [redacted] were illegal and that the exceptions in the accounts of the certifying officers were properly taken. As pointed out above, there was no obligation on the part of the Government until travel status was attained. We are unable to find any valid basis for approving the expenditures.

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11. In the case of [redacted], there is a factual question which might require clarification. She entered on duty on 16 June 1947. Available records establish that from September 1945 until 8 May 1947 she was working and living in Washington. It was therefore assumed by the auditor, and in the subsequent discussions, that she continued to reside in Washington from 8 May until the time of her entrance on duty with CIA. It is conceivable that she actually moved from Washington during this period and was brought back by CIA for temporary duty while en route to her foreign post. If this were true, it would give a technically legal basis for allowance of per diem, whatever the wisdom of such an action from an administrative point of view; but the burden of proof to establish such actual change of residence is on the certifying officer and the employee.

LAWRENCE R. HOUSTON

LRH:mbt

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